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No. 88-277

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

SEAWINDS LIMITED,
Petitioner,

v.

NEDLLOYD LINES, B.V., *et al.*,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONER'S REPLY BRIEF

THOMAS R. FAHRNER
(Counsel of Record)
MICHELE C. JACKSON
MICHAEL R. HUDSON
FURTH, FAHRNER, BLUEMLE & MASON
201 Sansome Street, Suite 1000
San Francisco, California 94104
Telephone: (415) 433-2070
Attorneys for Petitioner

Dated: September 23, 1988

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PETITIONER'S REPLY BRIEF

In their opposition brief, respondents mischaracterize the nature of the matter at issue and misstate both the relevant facts and the law applicable thereto. Accordingly, a brief reply is in order.

I.

THE ISSUE PRESENTED IS ONE OF FIRST IMPRESSION AND MERITS REVIEW BY THIS COURT

Respondents do not dispute that the issue presented is one of first impression, and they concede that the decision below stands as a precedent precluding application of Section 108(a) of the Bankruptcy Code to extend statutory filing periods which are not contained in statutes of limitation. Opp.Br., p. 3. Respondents attempt to minimize the implications of that decision, however, by suggesting that filing periods of the type included in the Shipping Act are unique to that Act and are not to be found in other legislation. Thus, respondents imply the decision below affects Seawinds and Seawinds alone. There is no merit to this contention.

Contrary to respondents' apparent belief, it is clear that time periods of the type contained in the Shipping Act have been enacted in other provisions of law. *See, e.g., Brazinski v. Mikatavage*, 29 Pa.D. & C. 551, 552-53 (1937) (statute forever abolishing cause of action for breach of contract to marry saved actions commenced within 60 days of enactment). It is also a virtual certainty that such time periods will continue to be legislated; indeed, such periods will exist every time a state legislature or Congress acts to limit or abolish an existing cause of action but reserves the right to bring such actions for a period of time after the limitation or abolition would otherwise take effect. Obviously, the decision below will preclude application of Section 108(a) with respect to all such time periods, so it cannot be said that the decision bears solely on this case. To the contrary, the issue presented in this case will recur in other cases far into the future.

In any event, the impact of the decision below is not limited only to cases where it might be cited as precedent to preclude claims brought on behalf of a bankruptcy estate. In fact, it has broad implications for virtually every case in which Section 108(a) could be invoked. This follows from the fundamental fact (which respondents ignore) that what makes Section 108(a) effective is the perception by trustees and debtors-in-possession that they can rely on it to preserve

the assets of the bankruptcy estate. Once it is established that a trustee or debtor-in-possession may not rely on Section 108(a) to interdict *any* and *all* time periods that might bar a potential cause of action on behalf of the bankrupt, however, this perception will be destroyed, and the trustee or debtor-in-possession will have no choice but to either immediately file all claims the bankruptcy estate may conceivably have or undertake an onerous and expensive investigation to assure that there are no time provisions in existence which cannot be tolled by Section 108(a). To do otherwise would risk forfeiting a potential claim on the off chance that a particular time limit might not be considered a statute of limitation to which Section 108(a) may be applied. Either course of action inevitably undermines Congress' policy and purpose of preserving the assets of the bankruptcy estate. For that reason alone, the question presented constitutes an important issue which merits resolution by this Court.

II.

THE DECISION BELOW IS ERRONEOUS

A. Section 108(a) Extends The One-Year Period Fixed In Section 20(e)(2)(B).

Contrary to respondents' contention, there is nothing in the legislative history of Section 108(a) or in the case law to suggest that the reach of that provision extends only to statutes of limitation. Respondents' authorities merely affirm that Section 108(a) extends statutes of limitation; they do not suggest that Section 108(a) may not have other applications as well. Seawinds' authorities, on the other hand, indicate that Section 108(a) extends all time periods fixed by applicable nonbankruptcy law, whether they are fixed in a statute of limitation or some other provision of law. *See, e.g., In re T.C.I., Ltd.*, 21 Bankr. 876 (Bankr.N.D.Ill. 1982) (holding that Section 108(a) extended the substantive time period at issue therein, even though that provision, unlike a statute of limitation, "constitute[d] a condition precedent to asserting a cause of action"; the court never once even alluded to the

time provision at issue therein as a statute of limitation, substantive or otherwise). Moreover, even assuming, as respondents do, that Section 108(a) can be applied only to statutes of limitation, it would still operate to extend the one-year time period fixed in Section 20(e)(2)(B) of the 1984 Shipping Act because, as the district court recognized, that period actually functions as a traditional statute of limitation. Pet., Appendix B at B13-B14. *See also Compagnie Generale Maritime v. S.E.L. Maduro (Florida), Inc.*, 23 S.R.R. 1085, 1090 (Adm.L.J. FMC 1986) (stating that Section 20(e)(2)(B) provides a "one-year period of limitation").[1]

B. Whether Seawinds Has A Remedy In The FMC Is Neither Clear Nor Relevant.

It is by no means clear, as respondents claim, that Seawinds has an effective remedy in an administrative proceeding before the Federal Maritime Commission ("FMC"). Indeed, the FMC has declined to make any across-the-board ruling that the 1984 Shipping Act will or will not apply to pre-Act conduct such as that alleged by Seawinds. Instead, the FMC has stated that the issue must be decided on a case-by-case basis to determine whether retroactive application would, under the circumstances of a particular case, lead to "manifest injustice," as defined by this Court in *Bradley v. Richmond School Board*, 416 U.S. 696 (1974). *See Application of Shipping Act of 1984 to Formal Proceedings Pending Before Federal Maritime Commission on June 18, 1984*, 49 Fed.Reg. 21,798 (1984). Pursuant to that determination, the FMC has, in a number of cases, demonstrated a reluctance to apply provisions of the 1984 Shipping Act to pre-Act conduct where there is doubt as to whether the conduct prohibited in the new Act was also proscribed by the predecessor Shipping Act

[1] The fact that Section 20(e)(2)(B) operates as a statute of limitation with respect to suits filed after March 20, 1984 clearly distinguishes that section from typical savings clauses, which save only *pending* actions. *See, e.g., Wilson v. Turnage*, 750 F.2d 1086, 1089 (D.C.Cir. 1984), *vacated on other grounds*, 755 F.2d 967 (D.C.Cir. 1985).

of 1916. *See, e.g., Compagnie Generale Maritime, supra,* 23 S.R.R. at 1086 n.1.[2]

In any event, whether Seawinds has any remedy in the FMC is not germane to the issue presented in this case. Applicability of Section 108(a) does not turn on the presence or absence of alternative remedies that may be available to the bankruptcy estate, for Section 108(a) is not concerned with remedies. Rather, it allows a trustee or debtor-in-possession to maintain any action on behalf of the estate that the bankrupt could have asserted when it filed for bankruptcy. *In re Graham,* 24 Bankr. 305, 313 (Bankr.N.D.Iowa 1982), *aff'd,* 726 F.2d 1268 (8th Cir. 1984). Otherwise, Section 108(a) presumably would have no application in any case where the bankruptcy estate has at least one cause of action which is not time-barred by an applicable limitation period. Such a result cannot be reconciled with the plain language and broad policies of Section 108(a).

C. Seawinds' Antitrust Claim Is Based Entirely On Pre-Shipping Act Conduct.

There is no merit whatsoever to respondents' claim that Seawinds' action is "based on post-Shipping Act conduct." Opp.Br., p. 5. The "artful pleading" doctrine on which respondents rely has no application here, because the complaint clearly seeks damages under the antitrust laws for only pre-Shipping Act conduct. Respondents' blatant misrepresentations cannot change that fact. Moreover, as respondents admit, the district court did not pass upon this issue, and the court of appeals affirmed the judgment of the district court "substantially for the reasons stated in its opinion."

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[2] Even assuming, *arguendo,* that Seawinds has an alternative remedy in this case, it is not correct, as respondents contend, that the decision below will have no adverse effect on bankruptcy estates in other cases. Clearly, if a legislature decides to abolish an existing cause of action, it is under no duty to establish a substitute enforcement mechanism and, in fact, in many cases it may not. *See, e.g., Brazinski v. Mikatavage,* 29 Pa.D.& C. 551 (1937) (statute forever abolished cause of action for breach of promise to marry without providing for any alternative action). In such cases, the decision below would obviously have an adverse impact on a bankruptcy estate.

III.

CONCLUSION

For the foregoing reasons, and those stated in the Petition, petitioner respectfully requests that this Court issue a writ of *certiorari*.

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THOMAS R. FAHRNER
(Counsel of Record)
MICHELE C. JACKSON
MICHAEL R. HUDSON
FURTH, FAHRNER, BLUEMLE & MASON
201 Sansome Street, Suite 1000
San Francisco, California 94104
Telephone: (415) 433-2070
Attorneys for Petitioner